Supreme Court of the United States

October Term, 1940.

No. 453.

JONAS WEIL,

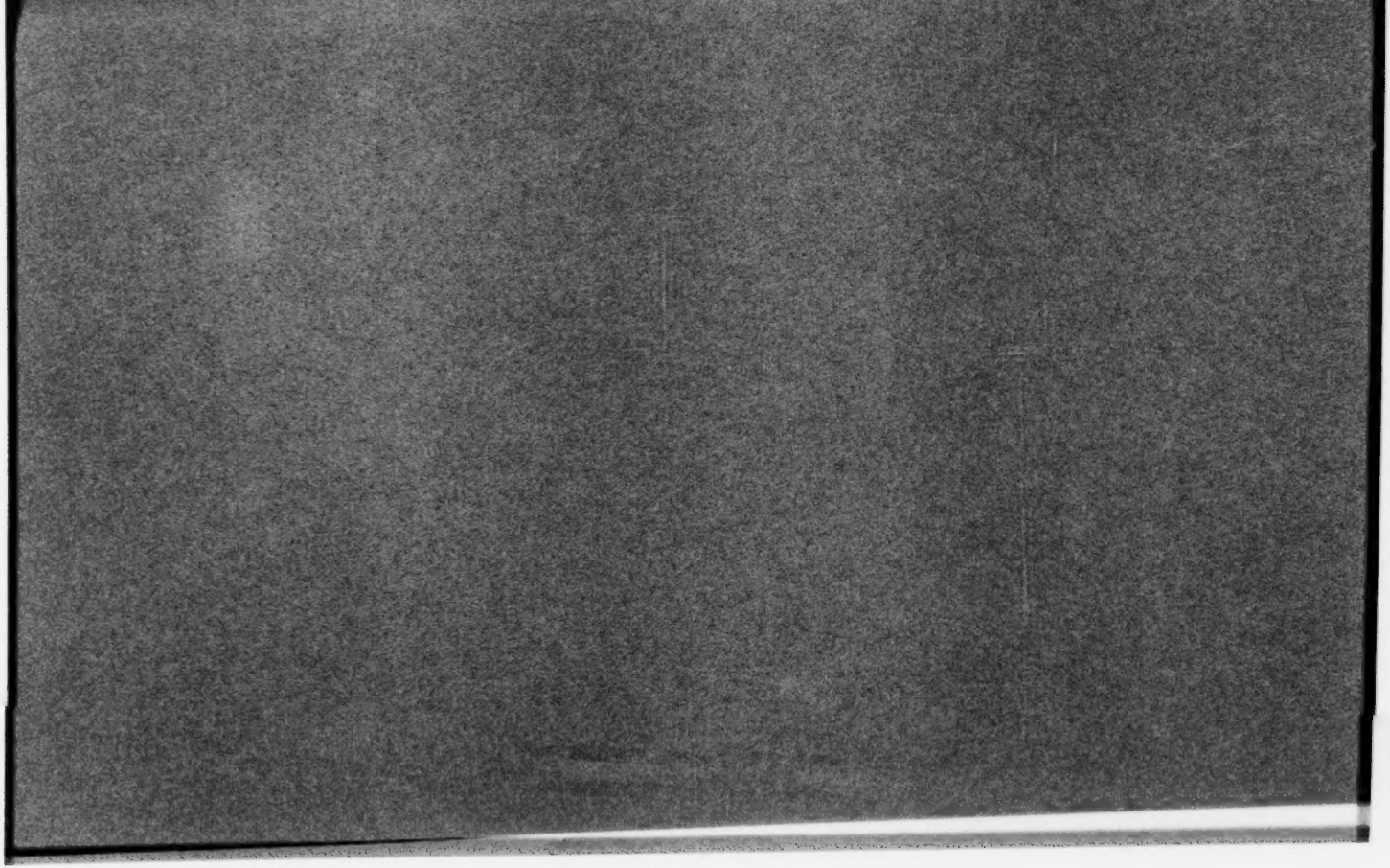
Petitioner,

against

COMPAGNIE GENERALE TRANSATLANTIQUE,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI



INDEX

CASES CITED

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Statement.

The opinion of the Circuit Court of Appeals, reported at 113 F. (2d) 720, states the facts concisely and correctly. Petitioner, however, avoids any reference to the fact that the presence, before petitioner's fall, of the "bulge" in the tarpaulin was admitted by him to be solely a matter of inference (R. 97, 98, 99, 100). The Circuit Court of Appeals characterized this claim of defect as "pure surmise." The inference of negligence urged by petitioner is based upon the inference of a pre-existing condition as to which there was no proof.

The theory on which the case was presented to the Circuit Court of Appeals for remedial action and correctly decided by it was:

I. The carrier was not an insurer. *In re Keansbury Steamboat Co.*, 249 Fed. 472, 474.

II. Since the instrument (the tarpaulin) alleged to have caused the accident was not under the sole control of the carrier, the doctrine of *res ipsa loquitur* cannot apply. *Slater* v. *Barnes*, 241 N. Y. 284, 287; *The Great Northern*, 251 Fed. 826, 829; *Cloud* v. *Kansas-Oklahoma Traction Co.*, 103 Kan. 249, 173 Pac. 338, 7 A. L. R. 1671.

III. The tarpaulin being no part of the "operative" equipment, the carrier's only obligation was to use ordinary care. *Pratt* v. *North German Lloyd S.S. Co.*, 184 Fed. 303, 304.

IV. Plaintiff-appellant did not prove either directly or circumstantially a pre-existing dangerous condition of which the carrier had either actual or constructive notice and therefore there was no proof of negligence. *Lavine* v. *United Paper Board Co.*, 243 N. Y. 631, affirming 217 App. Div. 709; *Ruppert* v. *Brooklyn Heights R. R. Co.*, 154 N. Y. 90, 93-94; *Demjanik* v. *Kultau*, 242 App. Div. 255, 256; *Chesapeake & O. Ry. Co.* v. *Burton*, 50 F. (2d) 730, 731; *Cornette* v. *Baltimore & O. R. Co.*, 195 Fed. 59, 61-62; *Windham* v. *Atlantic Coast Line R. Co.*, 71 F. (2d) 115.

V. Since under plaintiff's proof there was no evidence of the carrier's negligence, but on the contrary the strongest indication of his own carelessness, there was no question of fact to submit to the jury. *Bassell* v. *Hines*, 269 Fed. 231, 232; *Livingston* v. *Atlantic Coast Line R. Co.*, 28 F. (2d) 563, 566.

CONCLUSION

The petition should be denied.

The Circuit Court of Appeals was properly persuaded that to permit the verdict to stand would "* * * remove trial by jury from the realm of probability, based on evidence, to that of surmise and conjecture" (*Atchison, Topeka & Santa Fe R. Co.* v. *Toops,* 281 U. S. 351, 357). In any event, the matter is of no general importance nor will a consideration by this Court lead to any change in the basic principles that are applicable and which were properly applied by the Circuit Court of Appeals.

Respectfully submitted,

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